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No. 06-686

IN THE

Supreme Court of the United States

LUCKY I. IROMUANYA,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

BRIEF OF *AMICUS CURIAE* NEBRASKA APPLESEED CENTER FOR LAW IN THE PUBLIC INTEREST IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS[1]

The Nebraska Appleseed Center for Law in the Public Interest, Inc. is a non-profit, non-partisan public interest law project based in Lincoln, Nebraska. Nebraska Appleseed addresses problems at their roots – such as limited access to legal representation, unfair legislation and public policy, and denial of basic rights and opportunities – rather than the symptoms. Nebraska Appleseed seeks policies and practices that, among other things, insure a justice system that provides the opportunity for fair treatment no matter someone's income, education, race, national origin, or background. Nebraska Appleseed also has considerable experience and focus on the legal and policy issues of the region's "new immigrants," including membership on the Nebraska Supreme Court's Minority and Justice Task Force

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[1] Counsel of record for both petitioner and respondent have consented to the filing of this brief in letters that have been lodged with the clerk. Plaintiff's counsel authored this brief in part and made a monetary contribution to the preparation or submission of this brief.

Implementation Committee. Nebraska Appleseed believes that fair trials are at the core of a fair system of justice, and therefore wishes to share with the court its community-based perspective on the Petitioner's right to a fair trial.

SUMMARY OF ARGUMENT

The case of *Iromuanya v. State of Nebraska* demonstrates a conflict between state supreme courts – a conflict expressly recognized by the Nebraska Supreme Court (A22) – over the issue of whether the constitutional right to a fair trial precludes a member of the victim's family from giving identification testimony when: 1) the relative's testimony is highly emotional; 2) the defendant has stipulated to the identity of the victim; and 3) the testimony was preceded by the undisputed, identification testimony of a non-relative. The Nebraska Supreme Court addressed this issue by balancing of the prejudicial effect of the evidence against its probative value. This brief argues that the right to a fair trial requires, in addition to the above balancing, an examination of the atmosphere of prejudice surrounding the trial and the degree to which that environment increased the prejudicial effect of the evidence.

ARGUMENT

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

During the trial and post-trial proceedings, Petitioner's counsel made repeated fair trial objections.[2] The trial court, in turn, expressly addressed Petitioner's motion *in limine* and his post-trial motion as a challenge based on the constitutional right to a fair trial, concluding that Mrs. Cooper's identification testimony "was not so prejudicial as to have denied the defendant his *right to a fair trial.*" (A63) (emphasis added). Describing the issue as one involving the

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[2] In Petitioner's post-trial "Motion for New Trial," Petitioner objected to Mrs. Cooper's testimony on the ground that it "prevented Defendant from receiving a fair trial." (Motion for New Trial, ¶ 2). Also, on October 29, 2004, prior to Mrs. Cooper's testimony, Petitioner made an oral motion to exclude Mrs. Cooper as a witness based on both Rule 403 *and* the concern that Mrs. Cooper's testimony would deny Petitioner a fair trial because of "the impact it would have on the jury." (Trial Tr. Vol. I, 155-56; Motion to Exclude Witness, ¶ 7).

constitutional right to fair trial is consistent with the treatment of this issue by other state courts (including some cited by the Nebraska Supreme Court). *See e.g. Welty v. State*, 402 So.2d 1159, 1162 (Fla. 1981) (describing petitioner's claims as based on the argument that "he was denied a fair trial because the deceased victim's brother was permitted to give identification testimony"); *Bailey v. State*, 261 Ga. App. 291, 295 (2003) (finding family testimony was non-emotional and thus did not "deprive [defendant] of a fair trial"). After raising this issue before the trial court, Iromuanya's counsel repeated his "fair trial" challenge on appeal to the Nebraska Supreme Court[3], urging the Court to take into account the circumstances surrounding the trial and the fact that these external factors increased the prejudicial effect of Mrs. Cooper's testimony.

The right to a "fair trial," encompassing the right to due process under the Fifth and Fourteenth Amendments and

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[3] Appellant's Br. at 35, *State of Nebraska v. Iromuanya*, No. S-05-000367 (Sept. 12, 2005).

the right to an "impartial jury" under the Sixth Amendment,[4] requires an examination of extraneous factors that threaten the neutrality of the jury. It has long been recognized that such an examination is necessary to ensure that juries do not succumb to the prejudices of the public. Nevertheless, despite the fact that the events surrounding Iromuanya's trial may have caused the jury to give undue weight to the testimony of the victim's mother, the lower courts' decisions lack any analysis of the impact of these events.

A. History And Development Of The Right To Fair Trial.

The importance of isolating juries from extraneous considerations, particularly political influences, dates to the Athenian courts of antiquity. Michael Gagerian, The Rule of Law in Gortyn, *in* THE LAW AND THE COURTS IN ANCIENT GREECE (Edward Harris & Lene Rubenstein eds., Duckworth, 2004) at 173. By the eighteenth century, it was

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[4] *See The Juror's Need to Know vs. The Constitutional Right to a Fair Trial*, 97 Dick. L. Rev. 627, 654 n.1 (1993).

the jury, as "indifferent" trier of fact, that came to be viewed as the principal protector of the accused against the power of the state. W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (T. Cooley 4th ed. 1896) (describing the jury as a "strong and two-fold barrier...between the liberties of the people and prerogative of the crown"). The Founders' insistence upon a judiciary as a co-equal branch of American government was in large part motivated by the fear that placing the judiciary within one of the two other branches of government risked jeopardizing the independence of juries in their consideration of the evidence in criminal cases.[5]

At the beginning of the twentieth century, in a case similar to Petitioner's, Justice Oliver Wendell Holmes warned against the effects of public demonstrations on the right of an accused to obtain a fair trial. Leo Frank, a Jew,

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[5] *See* THE FEDERALIST NO. 47 at 336-38 (James Madison) ("The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.").

was tried in Atlanta for the murder of a young girl who worked in his uncle's factory. Mobs appeared outside the courtroom, and the galleries were filled with spectators who were demonstrably hostile to Frank. Despite these factors, the state contended that Frank's trial was free of procedural irregularities. Holmes dismissed the state's legal formalism, noting that "any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere," and concluded that the atmosphere surrounding Frank's trial denied him his constitutional right to a fair trial: "Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted." [6]

Half-a-century later, the Court overturned the conviction of a defendant, who had been accused of killing a

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[6] *Frank v. Magnum*, 237 U.S. 309, 347 (1915).

black employee and kidnapping three others, because a filmed interview between the sheriff and the defendant, in which the defendant admitted to the crimes, was widely broadcast during the days immediately following the crime. *Rideau v. Louisiana*, 373 U.S. 723, 723 (1963). The Court concluded, based upon the nature and extent of the prejudice generated by the broadcast, that the jury would have had difficulty reaching an impartial decision. *Id.* at 726-27. Cases such as *Frank* and *Rideau* demonstrate the Court's longstanding recognition of the fact that the environment surrounding a trial must be taken into account so as to ensure that defendants receive a fair trial.

B. Factors Affecting The Petitioner's Ability To Receive A Fair Trial.

The right to a fair trial imposes upon the courts a constitutional duty to prevent the intrusion of those factors which undermine the trial process. *See* Terri A. Belanger, *Symbolic Expression in the Courtroom: The Right to a Fair Trial Versus Freedom of Speech*, 62 Geo. Wash. L. Rev. 318

(1993-1994). Accordingly, courts "must try to prevent the 'atmosphere in and around the courtroom [from becoming] so hostile as to interfere with the trial process.'" *Id. quoting Woods v. Dugger*, 923 F.2d 1454, 1456 (11th Cir. 1991). The essential problem with the decision of the Nebraska Supreme Court is its failure to take into consideration the extent to which extraneous factors – (*e.g.*, the negative publicity leading up to and during the trial, the activity of white supremacists, and buttons with pictures of the victim worn in the courtroom by friends and relatives of the victim) – influenced the jury. These factors denied the Petitioner a fair review of the evidence by increasing the prejudicial effect of Mrs. Cooper's testimony and making it nearly impossible for the jury not to give undue weight to this testimony.

The extraneous factors that threatened the neutrality of the jury are threefold: 1) the negative public light cast on the Petitioner, arising in part out of the recent influx of immigrants into Nebraska; 2) white supremacist activity

surrounding the trial, with a direct effort to connect Petitioner to community prejudices; and, 3) the media attention afforded the victim due to her prominence in the community and the fact her life was taken by a member of an unwelcome new population.

The problem experienced by the Petitioner is not, unfortunately, unique in the State of Nebraska. Leaders within the legal and judicial system in Nebraska have recognized that minorities (including African and Latino immigrants) have less access to justice in Nebraska, including the right to a fair trial. These leaders therefore launched an ongoing process to address the barriers to justice that exist for minorities in Nebraska. Chaired by a Nebraska Supreme Court Justice, the Nebraska Supreme Court's Minority and Justice Task Force has found that "bias exists in the Nebraska justice system." Nebraska Minority and Justice Task Force, *Final Report*, January 2003, at xvii. In turn, the task force has committed itself to "a morally searching, permanent, institutional effort to study, address

and change those practices and procedures that may disadvantage minorities, whatever the cause of those practices." *Id.*

This is an honorable and necessary initiative. The implementation of these system-level reforms is, however, a long-term effort. In the Petitioner's case, the lingering effects of a system that has not yet come to full grips with how it insures a fair trial for every individual, despite race, ethnicity, or national origin, contributed to the conduct of a flawed trial.

The problems found in Nebraska's justice system have been heightened by Nebraska's rapidly growing foreign-born population (mostly Latino and African), the largest surge in over one-hundred years. Nebraska's foreign-born population, for example, grew the fastest of 10 Midwestern states between 1990 and 2000. Percentage growth in that same category from 2000-2005 was the eighth highest of any state in the United States. *See* Art Hovey,

Immigration Study Ties Strains on Communities to Reform Gridlock, LINCOLN JOURNAL STAR, December 5, 2006, at B1.

This demographic change in a previously white area of the country has come with both opportunity and great community frustration. The continuing failure of the federal government to adopt immigration reforms has left communities struggling with stopgap solutions to problems associated with rising immigrant populations, including those in the justice system. Over the last five years, local communities, including Lincoln, have been wrestling with how best to respond to these growing populations as well as deal with new "anti-immigrant" public actions and community sentiments. *Id.* (including how "the dialogue on immigration issues in the state is taking on increasingly racial overtones").

The Petitioner's family origins are of a piece with that surging population, and the community viewpoint as to newcomers such as the Iromuanyas is commonly negative. This is reinforced by how the media reported upon the trial.

The Petitioner's race and family origins was consistently referenced by the media, and usually offered in counterpoint to that of the victim's. The media consistently pointed out the same comparison between the victim and the Petitioner, in addition to issues related to interracial dating. *See, e.g., Jury Questionnaires to Have Question on Race,* LINCOLN JOURNAL STAR, September 25, 2004, at B3. The reality of a "white victim" and "black", "foreign," defendant was therefore abundantly clear to the community as a whole.

While this by itself is not reason for a new trial, it heightened the need for the trial court to conduct a fair trial. This extraneous factor was compounded by the actions of a very aggressive white supremacist group, which came into Lincoln specifically to exploit this tension. Given the type of media attention already given the race and origin of the Petitioner, the fact that white supremacists focused on the Petitioner's case was not surprising. A small amount of enterprise on their part was all that was necessary to ascertain that certain members of the Lincoln community were already

viewing the Petitioner's race and national origin as relevant to the proceedings.

In turn, their modest investment obtained a considerable return as the news reports from different major newspapers in the community not only ratcheted up the community concern regarding the white supremacist presence (including the "unprecedented" closing of the State Capitol and busy streets in downtown Lincoln), but also by consistently stating the reason for the white supremacist rally in the same manner and consistently making the same racial comparison between the victim and the Petitioner. *See, e.g.*, Martha Stoddard, *Nazi Rally to Draw Police Attention, Lincoln Authorities Plan 'Extraordinary Steps' to Keep the July 17 Event Peaceful*, OMAHA WORLD HERALD, July 2, 2004, at B4 ("Cooper, a 21-year-old University of Nebraska-Lincoln soccer player, was white. Lucky Iromuanya, who is black, has been charged with second-degree murder in her death."); Martha Stoddard, *Capitol Will Close for Nazi Rally*, OMAHA WORLD HERALD, July 13, 2004, at B1 ("The

commander of the National Socialist Movement ... said the group is going to Lincoln ... to draw attention to the number of Mexican immigrants in the state and to the shooting death of Jenna Cooper. Cooper, a 21-year-old University of Nebraska-Lincoln soccer player, was white. Lucky Iromuanya, who is black, is charged with second-degree murder in Cooper's death.").

Through their rallies and leafleting, the white supremacists achieved their objective: a continued poisoning of community sentiment against the Petitioner. The trial court in its balancing of factors should have been doubly certain, therefore, that a fair trial for the Petitioner occurred in all respects.

The victim, meanwhile, was consistently portrayed by the media as the highly respected and admired captain of the University of Nebraska-Lincoln's soccer team. *See, e.g.*, Shannon Henson, *Iromuanya Was Shocked to Hear Bullet Hit 2 People*, OMAHA WORLD HERALD, December 16, 2004, at B3 ("Cooper... anchored an NU defense that helped the

Huskers make their eighth straight NCAA tournament in 2003."). The relevance of the victim's prominent role in the University of Nebraska-Lincoln's athletic program to the critical importance of insuring fair trial procedures for the Petitioner cannot be understated. Lincoln and Nebraska as a whole is justifiably proud of its university athletic program, and the ways in which the program binds together a large state. To be a "Cornhusker" supporter is to be, in large part, self-identifying as part of the mainstream culture.

While a strong common bond, it also can reinforce community sentiment against those perceived as harming the program. It is clear that those who negatively affect the program are "outsiders," and must be penalized for their actions. The wearing of "buttons" in the courtroom accentuating the victim's soccer playing and role in the community played up the social violation committed by the Petitioner. In the case of the Petitioner, the fact he did not receive a fully fair trial and the subsequent harsh verdict

against him is in part explainable by this community prejudice.

The right to a fair trial for the Petitioner must not be denied. Nebraska is making huge strides towards equal justice for all, led by the courts and juries that daily must make decisions that balance many different considerations. Nevertheless, there are many new challenges to achieving this goal, and new immigrant and racial impacts on a previously homogenous society must continue to be addressed. In the case of the Petitioner, the balance necessary to insure a fair trial was clearly affected by extraneous factors and circumstances that affected the neutrality of the jury.

CONCLUSION

For the reasons set forth above, the Petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

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